IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHEREE ALTOM AND STEVE ALTOM **APPELLANTS**

V. **CAUSE NO. 2014-CA-01295**

HARLAND JONES **APPELLEE**

APPELLANTS' MOTION FOR REHEARING

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A. SUMMARY OF REASONS FOR GRANTING REHEARING.

1. The most compelling reason that rehearing should be granted in this case is because the Court affirmed the Chancellor's application of the natural parent presumption a year after the Chancellor found that the presumption had been rebutted by clear and convincing evidence. As argued below, it is of no consequence that the Chancellor found that the presumption was rebutted in what was termed a "temporary order." Even if the Order were temporary, the effect of the Altoms' rebutting the natural parent presumption was not. Once the presumption was rebutted it vanished as a matter of law.

2. It is error as a matter of law to apply a legal presumption once that presumption is rebutted by competent evidence. No other case stands for the proposition that a presumption may be applied once it was rebutted earlier in the litigation. This case will confuse Mississippi law as to the resurrection of rebuttable presumptions. Rehearing should be granted to clarify this issue.

3. Alternately, even if the rebuttal of the presumption could be somehow undone by future good behavior, such a finding could not follow here. The Chancellor made the factual finding that Harland deserted the child. Desertion cannot be undone. For this reason as well, it was error to apply the rebutted natural parent presumption.

4. Aside from these reasons, the Court misapprehended the law as it applies to the June 19, 2013, Order becoming permanent by the passage of time. It is of no consequence that the Chancellor intended the Order to be "temporary." Such is always the case when "temporary orders" become permanent by the passage of time. Regardless of the intent in June 2013, the Order had nevertheless become permanent by June 2014. Thus, the Chancellor erred in

modifying the Order absent a material change in circumstances. For this reason also, rehearing should be granted.

B. LEGAL PRESUMPTIONS CANNOT BE APPLIED ONCE THEY ARE REBUTTED, EVEN IF THEY ARE REBUTTED IN A NON-FINAL JUDGMENT.

5. The Supreme Court has held that when the natural parent presumption is rebutted by clear and convincing evidence, it "vanishes." *Pendleton v. Leverock*, 23 So. 3d 424, 431 (Miss. 2009). After the presumption is once overcome, it is inapplicable. *See Logan v. Logan*, 730 So. 2d 1124, 1127 (Miss. 1998).

6. Once the natural parent presumption is rebutted by clear and convincing evidence "the presumption vanishes, and the court must go further to determine custody based on the best interests of the child through an on-the-record analysis of the *Albright* factors. *Pendleton*, 23 So. 3d at 431.

7. No authority supports the proposition that a legal presumption can be applied once it has been rebutted by the proper evidentiary standard. Indeed, to resurrect a legal presumption is contrary to the very nature of rebuttable presumptions in the law.

8. The Opinion in this case addressed this issue as follows:

> Our review of the record indicates that the chancery court never intended for the "temporary" orders granting custody to the Altoms to serve as final judgments in the matter. The very fact that the court set a follow-up hearing serves as confirmation that nothing was final regarding custody of Hayden. Therefore, we agree with Jones and find that the chancery court was well within its discretion in finding that Jones was entitled to the natural-parent presumption due to the progress that Jones has made in rehabilitating himself as a parent.

Altom v. Jones, 2014-CA-01295-COA Slip Op. at p. 7 ¶ 13.

9. Whether the Order was a final judgment is immaterial to this issue. The Chancellor's intent is not at issue. Whether the Chancellor intended to revisit custody of the child later is not the issue. Rather, the issue is an analytical one: whether a legal presumption can be resurrected

after it is ruled to have been rebutted previously in the litigation. The Opinion in this case is the only authority which so holds.

10. The Chancellor ruled as follows on June 19, 2013:

> The first two and a half (2 ½) years of Hayden Jones' life, there was clear and convincing evidence desertion of said child by the [Harland Jones'] avoidance of duties and obligations for the child, leaving same nearly totally in the hands of the [Altoms], though with some small monetary contribution and some small sporadic contact by [Harland Jones], thus rebutting the natural parent presumption by clear and convincing evidence.

(C.P. p. 166).

11. Approximately a year after this crucial ruling, the Chancellor reversed course and ruled that the natural parent presumption applied. This was clear-cut legal error. Once the Chancellor found that the natural parent presumption had been rebutted by clear and convincing evidence as of June 19, 2013, it was error to subsequently apply the presumption later in the litigation.

12. If the decision in this case stands, it will either change Mississippi law applicable to rebuttable presumptions, or it will be a worrisome anomaly. Rehearing should be granted to conform the decision in this case to long-standing precedent.

C. DESERTION OF A CHILD CANNOT BE UNDONE BY A SUBSEQUENT CHANGE IN BEHAVIOR.

13. The Chancellor made the factual finding that Harland deserted the child. This factual finding is reviewed deferentially. The Court accepts the Chancellor's findings of fact so long as they are not "clearly erroneous." *Sproles v. Sproles*, 782 So. 2d 742, 746 (Miss. 2001).

14. The Chancellor's finding of desertion is supported by ample evidence in the Record. Thus, in its analysis, the Court must accept that Harland deserted the child.

15. Desertion involves "an avoidance of a duty or obligation." *Pendleton*, 23 So. 3d at 430. As such, desertion is a discrete act. Once a desertion is accomplished, it cannot be undone. Just as a bell cannot be unrung, a child cannot be "un-deserted."

16. Accordingly, even if the natural parent presumption could be logically applied in this case after its rebuttal, it would nevertheless be inapplicable here. Accordingly, for this reason as well, rehearing should be granted.

D. THE JUNE 19, 2013, ACQUIRED INCIDENTS OF PERMANCY REGARDLESS OF THE ORDER BEING DENOMINATED AS A TEMPOARY ORDER.

17. The Opinion in this case recognized that temporary orders may acquire "incidents of permanency" such that the burden of proof for modifying the Order changes. *Quadrini v. Spradley*, 964 So. 2d 576, 580 (Miss. Ct. App. 2007). However, the Court found that because the Chancellor intended the Order to be temporary in nature, this legal principle was inapplicable.

18. A Trial Court's intent for an Order to be temporary does not prevent the Order from being transformed to a final Order. Indeed, it is only when the Court does intend to make an Order temporary that it becomes final by virtue of the passage of time. The fact that the Chancellor intended the June 19, 2013, Order to be temporary has nothing to do with whether it became a *de facto* final order by the passage of time. An Order intended to be temporary and left in place for a long time transforms to a permanent Order for purposes of the burden of proof to modify the Order. This is precisely what occurred in this case.

19. The Court's reasoning that the Chancellor's express intent of making the June 19, 2013, Order temporary exempts it from the "incidents of permanency" analysis will eviscerate the rule announced in *Quadrini*. If the Trial Court's intent to make an Order temporary precludes it from becoming permanent under this analysis, *Quadrini* and other cases echoing its logic will stand as

effectively overruled. If an expressed intent to make an Order temporary, rather than final, exempts the Order from the "incidents of permanency" analysis then this doctrine will be inapplicable in Mississippi law.

20. Again in this respect, the opinion will work a noticeable effect on Mississippi precedent. Rehearing should be granted for this reason.

E. CONCLUSION

21. Respectfully, the Court misapprehended the law applicable to this case within the meaning of Miss. R. App. P. 20(a).

22. Appellants Steve and Sheree Altom request the Court to grant their Petition for Rehearing, to withdraw the Opinion in this matter and to issue an opinion reversing and rendering judgment in their favor.

RESPECTFULLY SUBMITTED, this the 24th day of May, 2016.

MCLAUGHLIN LAW FIRM

By: /s/ R. Shane McLaughlin

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellants in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Appellants' Motion for Rehearing** to all counsel of record and the Trial Court Judge by the MEC system or by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Hon. John A. Hatcher
Chancellor
Post Office Box 118
Booneville, Mississippi 38829

Walter A. Davis
Dunbar Davis, PLLC
324 Jackson Avenue East
Oxford, MS 38655

This, the 24th day of May, 2016.

/s/ R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Appellants' Motion for Rehearing** via the Court's MEC e-filing system.

This, the 24th day of May, 2016.

/s/ R. Shane McLaughlin